IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No.364 of 2007

Date of decision 25.9.2007

Suresh Kumar **Petitioner**

Vs.

State of H.P. and others **Respondents**

Coram:

The Hon'ble Mr. Justice V.K.Gupta, C.J.

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1]

For the Petitioner: Mr.N.K.Thakur, Advocate.

For the respondents: Mr.M.S.Chandel, Advocate General, with Mr.J.K.Verma, Dy. Advocate General for respondents No.1 to 4.

Mr.Onkar Jairath, Advocate, for respondent No.5.

V.K.Gupta,C.J. (Oral)

Petitioner was the successful bidder for the allotment of vends with respect to Unit No.9 (L-14), comprising Villages Bhadsali and Ghaluwal. Despite the fact that the petitioner was No.1 bidder, the vends were not allotted in his favour for the Financial Year 2007-2008 starting from 1.4.2007 on the ground that after the completion of the draw of lots the Selection Committee made several Announcements but the petitioner or his representative did not turn up or come forward to appear before the Selection Committee. Respondent No.5, being No.2 in the panel list and who was present in the hall, was allotted the aforesaid two vends. Aggrieved, the petitioner approached this Court by filing the present writ

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[1] Whether reporter of local papers are allowed to see the judgment ?

petition under Article 226 of the Constitution of India complaining of arbitrary action on the part of respondents No.1 to 4. On 30.3.2007, taking cognizance of the aforesaid complaint of the petitioner, this Court passed the following detailed order admitting the writ petition to hearing and granting ad interim relief in favour of the petitioner to the extent that the action of respondents No.1 to 4 in cancelling the allotment of the petitioner and in allotting the aforesaid liquor vends to respondent No.5 was stayed and suspended. Order dated 30.3.2007 reads thus:

> **"As is evident from our order dated 28.3.2007 and as is accepted by Mr.Thakur, learned counsel for the petitioner and Mr.M.S.Chandel, learned Advocate General appearing for respondents No.1 to 4, the only issue of controversy forming the subject matter of this petition relates to the non allotment of the contract of liquor vend in favour of the petitioner despite the petitioner having emerged as No.1 successful person in the draw of lots, on the ground that at the stage of draw of lots/making the allotment, the petitioner was not physically present. Even though Mr. Chandel has not filed a written reply to the writ petition he does state before us that as per instructions received by him, the only ground upon which the petitioner's allotment was apparently cancelled was his absence at the time of draw of lots. We have seen and Mr. Chandel agrees with us that there is no stipulation contained any where that all persons who are candidates must be physically present at the time of draw of lots or that the candidature or allotment of contract, of any person is liable to be cancelled if he is absent at the said time. According to Mr. Chandel, it is only on this ground that after the cancellation of the petitioner's allotment, the allotment was made in favour of the second successful person, namely, respondent No.5.**
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> **The aforesaid apparently and prima facie is a clear case of an arbitrary exercise of executive power and a patent violation of Article 14 of the Constitution.**
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> **The petition is admitted.**
>
> **Notice to respondent No.5.**

CMP No.647 of 2007

Notice. Reply in four weeks.

In the meanwhile, the action of respondents No.1 to 4 in canceling the allotment of the petitioner and in allotting the contract of the liquor vend in question to respondent No.5 is stayed and suspended."

After 30.3.2007 for the first time this matter is appearing before us today.

We have been taken through the reply filed by respondents No.1, 2 and 4 and found that on 2.4.2007, the Financial Commissioner(Excise)-cum- Excise & Taxation Commissioner, H.P., Shimla passed an order entirely on his own, operative part whereof reads thus:

"For the foregoing reasons, I am of the view that the allotment in favour of Lekh Raj who was at No.2 in the draw of lot has been made arbitrarily and without giving reasonable time as per the Excise Announcements to the No.1 in the draw of lot. Therefore, the allotment in favour of Shri Lekh Rahj is wrong. Hence, Liquor vend of Ghaluwal Unit of Una district is allotted to Shri Suresh Kumar. This order shall be subject to the decision of the Hon'ble High Court in CWP No.364/07. The AETC, Una is directed to take necessary action accordingly."

The Excise and Taxation Commissioner, the author of the aforesaid order, is neither a party-respondent in this case nor was any direction issued by this Court qua him for either taking any action or for passing any order. A perusal of the said order, read with the contents of the reply filed by respondents No.1, 2 and 4 on 15.9.2007 (supported by the affidavit of Excise and Taxation Commissioner affirmed on 13.9.2007) shows that he apparently was influenced and carried away by the alleged fact of the Government incurring loss at the rate of Rs.15,000/- per day for the non-functioning of the liquor vend and since apparently in his opinion the interim order passed by this Court on 30.3.2007 was the cause for the

incurring of the said alleged loss by the Government, he without waiting for any adjudication by this Court with respect to the issue of arbitrariness involved in the writ petition took upon himself the burden of adjudicating upon this issue, ultimately thus having come to the finding that the presence of the successful bidder was not a condition precedent for allotment of the contract. Consequently he cancelled the allotment having been made in favour of respondent No.5 and allotted the contract to the petitioner.

Two things emerge from the reading of the aforesaid order passed by the Excise and Taxation Commissioner. Firstly, that it is a case of clear admission on the part of the respondents that indeed there was no stipulation in the brochure or in any document accompanying the same or in any Announcement that the presence of the successful bidder or his representative was mandatory, essential or a condition precedent for the allotment of the vend in his favour. If there was no such stipulation or condition, the allotment of vend to the successful bidder could not have been cancelled and the successful bidder could not have been deprived of his right to allotment only because of his absence at the time of the Announcements. The reading of the aforesaid order along with aforesaid reply of respondents No.1, 2 and 4 leaves no manner of doubt that the impugned action of the respondents was arbitrary as well as whimsical.

The other issue, more particularly, which arises for consideration before this Court is when this Court was seized of the aforesaid matter and when this Court was to determine about the illegality of the impugned action of the respondents in depriving the petitioner of the right to allotment of the vends on the aforesaid ground of the petitioner's absence (no other ground was involved for consideration in this case) was it open to the Excise and Taxation Commissioner in the absence of any direction from this Court and he not being a party-respondent in this case, to take

upon himself the task of adjudicating the aforesaid issue and to decide the same, thus pre-empting a decision by this Court. Apparently the only motivating factor which influenced the Commissioner in adopting the aforesaid course of action was the alleged incurring of daily loss of Rs. 15,000/- because of the non-functioning of the vend. The Commissioner perhaps thought that by taking upon himself the aforesaid task on 2nd April, 2007, he would save the exchequer of the aforesaid loss. However, he forgot in the process that it was not any part of his duty to adjudicate upon a matter which was pending adjudication in this Court. Actually the Commissioner by his aforesaid conduct set up a fait accompli as far as this Court is concerned. He not only attempted to thwart the process of justice but also directly interfered in the functioning of this Court as far as the adjunction of this case is concerned. He arrogated to himself the power and jurisdiction of this Court with respect to a matter sub-judice here. We, therefore, apparently feel that the Commissioner has prima facie committed contempt of this Court.

As far as the first issue is concerned, for the reasons stated hereinabove, we allow this petition and quash and set aside the impugned action of respondents No.1, 2 and 4 and while cancelling the allotment made in favour of respondent No.5 direct respondents No.1, 2 and 4 to allot the contract of the vends in question in favour of the petitioner. We know that this direction being passed by us is merely academic in nature because apparently the order dated 2nd April, 2007 passed by the Excise and Taxation Commissioner has already been implemented. Yet we have to perform our duty and dispose of this writ petition on its merits and the only order which we can pass is the issuance of writ in the nature of certiorari, which we have done hereinabove. Because the respondents acted in patent violation of the principles of natural justice and deprived the petitioner of his right to be allotted the contract of the aforesaid two

liquor vends, and because the impugned action of the respondents is not supported by any provision of law, we award costs of rupees one lakh to the petitioner and direct respondents No.1, 2 and 4 to pay the same to the petitioner within two months from today.

We also hereby issue Rule against the Excise and Taxation Commissioner, Himachal Pradesh, Shimla-9 to appear in person in the Court on the next date to answer the contempt charge. Whereas the writ petition is being disposed of, the contempt petition be registered separately. The Registry is directed to list the contempt alone on 24th October, 2007.

Accordingly the writ petition is allowed.

(V.K.Gupta), C.J.

September 25,2007. **(Rajiv Sharma),J.**

*****Awasthi***